



STATE OF INDIANA

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March 12, 2014

Ms. Kim Kilbride
C/o South Bend Tribune
225 W. Colfax
South Bend, IN 46626

Re: Formal Complaint 14-FC-17; Alleged Violation of the Access to Public Records Act ("APRA") by the City of South Bend

Dear Ms. Kilbride,

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has responded via Ms. Carrie K. Gaines, Esq., City Attorney. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 6, 2014.¹

BACKGROUND

¹ You have indicated the date of the partial denial of your records request was December 30, 2013 – the date the denial was drafted. The 30-day deadline for filing a formal complaint under Ind. Code § 5-14-5-7(a) had elapsed by February 6, 2014 when it was received by the PAC Office. Ind. Code § 5-14-5-7(b), however, states that a complaint is considered filed on the date it is: (1) received by the counselor; **or** (2) postmarked, if received more than thirty (30) days after the date of the denial that is the subject of the complaint. I have confirmed with the South Bend Postal Service that your envelope was postmarked on January 31, 2014 and therefore still outside the thirty day timeline. As such, this opinion is for advisory purposes only and not to be used as the exhaustion of an administrative remedy under Ind. Code § 5-14-3-9 *et. al.* Consequently, I also decline to state affirmatively whether the public access laws have been violated. See *Gary/Chicago Airport Board of Authority v. Maclin*, 772 N.E. 2d. 463, 471 (Ind. Ct. App. 2002).

Your complaint dated February 6, 2014, alleges the City of South Bend violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

In your complaint, you explain you have been made aware of a practice by the City of South Bend law enforcement whereby school resource officers have been issuing citations to schoolchildren. This practice would presumably be in lieu of traditional administrative discipline levied by the school. Upon learning of the protocol, you served upon the City a public records request seeking “permission to inspect and copy every citation given to South Bend Community School Corporation students by South Bend (Police) school resource officers for [2001-present].”

The City responded to your request by producing records for students aged eighteen (18) and up, but withheld records for any student under eighteen (18). As legal justification for withholding the documents, they cited both the investigatory record exception and the juvenile court record exception. The City raised these arguments in their response to your formal complaint as well. Investigatory records of law enforcement agencies are not to be mandatorily released under Ind. Code § 5-14-3-4(b) and any other confidentiality provisions of the Indiana Code are to be taken under consideration when disclosing documents. See Ind. Code § 5-14-3-4(a) *et.al.*.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The City of South Bend is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

As indicated in many of my prior opinions, I believe the General Assembly commonly considers law enforcement records as a particularly sensitive category of information. There are many exceptions to disclosure based upon the notion the dissemination of investigatory material will have a detrimental effect on the investigation/criminal proceeding moving forward. As the City correctly points out, Ind. Code § 5-14-3-4(b)(1)

is one of those instances. "Investigatory record" means information compiled in the course of the investigation of a *crime*. Ind. Code § 5-14-3-2(i). Emphasis added.

Note investigatory records only relate to criminal investigations. Ind. Code § 35-31.5-2-75 defines "crime" as a felony or misdemeanor. The City produced those citations for individuals over eighteen (18) of which you have provided copies to me. A survey of those complaints indicate the citations are invariably for violations of Ind. Code § 35-42-2-3, colloquially referred to as "disorderly conduct". The statute is clear a violation of Ind. Code § 35-42-2-3 is an infraction and not a felony or misdemeanor. Therefore, by the plain meaning of the statute, an infraction is not a crime.

There is no investigatory record exception under the APRA for investigations of an infraction. Even if the citation (which is written on a Bureau of Motor Vehicles Complaint and Summons Form) could be considered investigatory, then it is disclosable because it is not pursuant to the investigation of a crime, but rather an infraction.

The City also argues the release of the citations would be prohibited by Ind. Code § 31-39-1 *et. al.*, the Chapter of the Indiana Code dealing with the confidentiality of juvenile court records. I am not necessarily compelled by this argument. I do not have any information before me, nor has it been indicated by the City, the citations fall under the specific exclusive jurisdiction of a juvenile court. The citations refer to St. Joseph's County Circuit Court which is a court of general jurisdiction. The statute cited by the City only applies to juvenile *court* records and not juvenile records generally. In fact, the City goes so far to cite a 2008 Public Access Counselor memo on the accessibility of juvenile records. In that memo, the Counselor stated, in reference to Ind. Code § 31-39-3-2:

When a juvenile is alleged to have committed an act that would have been a crime if committed by an adult, the following information contained in the records is accessible to the public:

- The nature of the offense allegedly committed and the circumstances immediately surrounding the alleged offense, including the time, location, and property involved
- The identity of any victim
- A description of the method of apprehension
- Any instrument of physical force used
- The identity of any officers assigned to the investigation, except for the undercover units
- The age and sex of any child apprehended or sought for the alleged commission of the offense
- The identity of a child, if the child is apprehended or sought for the alleged commission of an offense over which a juvenile court does not have jurisdiction under IC 31-30-1-2

This illustrates not all juvenile records are confidential; only the release of records subject to a juvenile court are discretionary. Quoting *Edelen v. State*, 947 N.E.2d 1024 (2011): "All court records are generally available to the public, see Admin. R.

9(D)(1), and the same is true for proceedings in a juvenile court, see *T.N. v. B.D. (In re Paternity of K.D.)*, 929 N.E.2d 863, 872 (Ind. Ct. App. 2010). To be confidential, there must be an express statute or rule stating so.”

From the citations I have seen, the behavior warranting the citations are considered infractions. If these citations are in fact all infractions, the Legislature has excluded infractions (and ordinance violations) from the list of subject matter over which juvenile courts have jurisdiction.² See Ind. Code § 31-30-1-2. Because infraction citations have not been declared confidential by Indiana law, they would not be exempted from disclosure under Ind. Code § 5-14-3-4(a)(1-2) or Ind. Code § 31-39-1 *et. al.*

Based on the foregoing the City should make best efforts to comply with your request and should consider this Opinion a recommendation to release the information you seek without delay.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

Cc: Ms. Carrie K. Barnes, Esq.

² This statute contains an exception for certain alcohol and tobacco related crimes under Ind. Code § 7.1-5.